

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0362-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ERNESTO RODRIGUEZ-CASTRUITA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20081139

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney
By Dana E. Owens

Prescott
Attorneys for Respondent

Ernesto Rodriguez-Castruita

Tucson
In Propria Persona

K E L L Y, Judge.

¶1 Ernesto Rodriguez-Castruita seeks review pursuant to Rule 32.9(c), Ariz. R. Crim. P., of the trial court’s order denying his motion to reinstate his post-conviction relief proceeding brought pursuant to Rule 32. For the reasons that follow, we grant review but deny relief.

¶2 Rodriguez-Castruita pled guilty to reckless manslaughter and the trial court sentenced him to an aggravated fourteen-year prison term. Rodriguez-Castruita filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but had found no claims for relief to raise in a post-conviction proceeding. On May 20, 2010, the court ordered that Rodriguez-Castruita would have forty-five days to file a pro se petition. He did not file a petition and the court dismissed the Rule 32 proceeding on August 5, 2010, stating it had reviewed the filings and record and found no basis for post-conviction relief.

¶3 On August 25, 2011, Rodriguez-Castruita filed a “motion for praecipe and to re-instate Rule (32) proceedings,” requesting permission to file a “delayed petition” pursuant to Rule 32.1(e) and raising various claims related to his sentencing. Noting the Rule 32 proceeding had been dismissed, the trial court denied the motion on September 7. Rodriguez-Castruita sought reconsideration of that ruling on September 19, which the court denied. This petition for review followed.

¶4 It is not entirely clear how to properly characterize Rodriguez-Castruita’s various filings below. Nothing in Rule 32 contemplates a motion to reinstate a dismissed proceeding. To the extent he intended his motion as an attempt to seek rehearing pursuant

to Rule 32.9(a), it was not filed timely and his petition for review from the trial court's denial of that motion also is untimely. Ariz. R. Crim. P. 32.9(c). Nothing in Rule 32 provides that a motion for reconsideration of the denial of a motion for rehearing extends the time to file a petition for review. *Cf. State v. Berry*, 133 Ariz. 264, 267, 650 P.2d 1246, 1249 (App. 1982) (motion for reconsideration does not extend time for appeal).

¶5 However, although the trial court apparently did not treat it as such, Rodriguez-Castruita's motion to reinstate his Rule 32 proceeding cited Rule 32.1(e) and at least arguably could be construed as a successive petition for post-conviction relief.¹ But even if we so generously construe Rodriguez-Castruita's motion, he is not entitled to relief. Rule 32.1(e) provides as a ground for relief that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." And a claim under Rule 32.1(e) is not subject to preclusion pursuant to Rule 32.2(a) and may be raised in a successive petition. Ariz. R. Crim. P. 32.2(b). Rodriguez-Castruita's filing below and his petition for review do not identify any newly discovered material facts as contemplated by Rule 32.1(e), much less explain why his claim was not raised previously, *see* Ariz. R. Crim. P. 32.2(b), and instead appear to raise a claim of ineffective assistance of trial counsel at sentencing and various other sentencing claims. Those claims are precluded because he did not raise them in his first Rule 32 proceeding.

¹If construed as such, then Rodriguez-Castruita's motion for reconsideration, if treated as a motion for rehearing, would extend the time for filing a petition for review and render his petition filed in this court timely under Rule 32.9(c).

See Ariz. R. Crim. P. 32.2(a)(3). Thus, the trial court did not err in denying Rodriguez-Castruita's motion summarily.

¶6 For the reasons stated, although review is granted, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge